Lebanon County Legal Journal

The official legal periodical for Lebanon County containing the decisions rendered in the 52nd Judicial District

Vol. 51 | Lebanon, Pennsylvania, April 9, 2014 | No. 28

Public Notices

DECEDENTS' ESTATES

Opinion

COFFEY VS. BEHL No. 2010-5-0646

Published every Wednesday. Advertisements must be at Room 305, Municipal Building, 400 South Eighth Street, Lebanon PA, 17042 by 11 a.m. of preceding Monday.

Lebanon County Legal Journal, per bound volume....................$95.00
Advance Sheets, per year..$97.75
Single copy, advance sheets...$4.00

717-228-4411; www.lebanoncountylegaljournal.org

Owned and published by the Lebanon County Bar Association
Paul W. Kilgore, Esq., Chairman
C. Walter Whitmoyer, Jr., Esq., Editor
Stephanie Axarlis, Esq., Editor

DECEDENTS' ESTATES

NOTICE IS HEREBY GIVEN that Letters Testamentary or of Administration have been granted in the following estates. All persons indebted to the said estate are required to make payment, and those having claims or demands to present the same without delay to the administrators or executors named.

FIRST PUBLICATION

ESTATE OF GLORIA B. GALLOP, late of Cornwall Borough, Lebanon County, PA, deceased. Letters Testamentary have been granted to the undersigned Executor.

Charles E. Gallop, Executor
133 N. Hoover Street
Myerstown PA 17067

Kenneth C. Sandoe, Esquire
Steiner, Sandoe & Cooper, Attorneys

ESTATE OF JOHN T. KERKESLAGER a/k/a John Thomas Kerkeslager, late of Lebanon County, PA, deceased. Letters Testamentary have been granted to the undersigned Executor.

Heidi A. Ohl, Executor
c/o Anthony J. Fitzgibbons, Esquire
279 North Zinn's Mill Road
Lebanon PA 17042

ESTATE OF JAMES A. MATTHEW, late of Lebanon City, Lebanon County, PA, deceased. Letters Testamentary have been granted to the undersigned Executor.

Treva F. Matthew, Executor

c/o Adrienne C. Snelling, Esq.
Sullivan, Sullivan & Snelling, P.C.
242 S. Eighth Street
Lebanon, PA 17042-6010

SECOND PUBLICATION

ESTATE OF DONNA K. DRUM, late of Lebanon City, Lebanon County, PA, deceased. Letters Testamentary have been granted to the undersigned Executor.

Beverly A. Hibschman, Executor
709 Deerbrook Road
Bel Air MD 21014

Kenneth C. Sandoe, Esquire
Steiner, Sandoe & Cooper, Attorneys

ESTATE OF ESTHER H. EBERSOLE, late of Lebanon, deceased. Letters Testamentary have been granted to the undersigned Executor.

Curvin D. Ebersole, Executor
Darrel L. Ebersole, Executor
245 Village Drive
Lebanon PA 17042

Randall M. Fischer, Attorney

ESTATE OF GEORGE E. FUNK, late of Palmyra Borough, Lebanon County, deceased. Letters Testamentary have been granted to the undersigned Executor.

Gerald J. Brinser, Executor
6 East Main Street
P.O. Box 323
Palmyra PA 17078

Keith D. Wagner, Attorney

ESTATE OF VERDA E. LAYSER, late of Palmyra Borough, Lebanon County, PA, deceased. Letters Testamentary have been granted to the undersigned Executor.

Andrew P. Layser, Executor
430 W. Township Line Road
Downingtown PA 19335

ESTATE OF VINCENT A. MIONE, late of Lebanon City, Lebanon County, PA, deceased. Letters Testamentary have been granted to the undersigned Executor.

Samuel A. Mione, Executor
c/o Timothy D. Sheffey, Esquire
Reilly, Wolfson, Sheffey, Schrum and Lundberg
1601 Cornwall Road
Lebanon PA 17042

ESTATE OF RUTH W. NEIFFER, late of West Cornwall Township, Lebanon County, PA, deceased. Letters Testamentary have been granted to the undersigned Executor.

Janet R. Neiffer, Executor
2316 Harvey John Avenue
Lebanon PA 17042

Or to
David L. Allebach, Jr., Esquire
Yergey, Daylor, Allebach, Scheffey, Picardi
1129 East High Street
P.O. Box 776
Pottstown PA 19464-0776

ESTATE OF ESTHER S. SNAVELY, late of Jackson Township, Lebanon County, PA, deceased. Letters Testamentary have been granted to the undersigned Executor.

David L. Peters, Executor
804 Maple Lane
Lebanon PA 17046

Thomas S. Long, Esquire
Siegrist, Koller, Brightbill, Long & Feeman
315 South Eighth Street
Lebanon PA 17042

ESTATE OF JOHN M. WENGER a/k/a John Martin Wenger, late of South Londonderry Township, Lebanon County, PA, deceased. Letters Testamentary have been granted to the undersigned Executor.

Rebecca B. DeWees
c/o Patrick M. Reb, Esquire
547 South Tenth Street
Lebanon PA 17042

THIRD PUBLICATION

ESTATE OF MATILDA L. BITTENBENDER, late of Jackson Township, Lebanon County, PA, deceased. Letters Testamentary have been granted to the undersigned Executor.

Emily B. Bittenbender, Executor
176 Waterton Road
Shichshinny PA 18655

Thomas N. Cooper, Esquire
Steiner, Sandoe & Cooper, Attorneys

ESTATE OF FAYE H. SAYER, a/k/a Faye Sayer, late of Myerstown Borough, Lebanon County, PA, deceased. Letters Testamentary have been granted to the undersigned Executor.

Donald S. Sayer, Executor
214A Main Street
Oley PA 19547

Or to:
Walter M. Diener, Jr., Esquire
Kozloff Stoudt
2640 Westview Drive
Wyomissing PA 19610

ESTATE OF ANNA U. SHOTT, late of Lebanon City, Lebanon County, PA, deceased. Letters Testamentary have been granted to the undersigned Executor.

James W. Umberger, Executor
c/o Timothy D. Sheffey, Esquire
Reilly, Wolfson, Sheffey, Schrum and Lundberg
1601 Cornwall Road
Lebanon PA 17042

ESTATE OF RUBY I. SMITH, late of North Londonderry Township, Lebanon County, PA, deceased. Letters Testamentary have been granted to the undersigned Executor.

Dennis E. Smith, Executor
4460 Pasture Drive
Elizabethtown PA 17022

Chad J. Julius, Esquire
Jacobson, Julius & McPartland
8150 Derry Street
Suite A
Harrisburg PA 17111

ESTATE OF GILBERT L. WEAVER, SR., late of Palmyra, Lebanon County, PA, deceased. Letters Testamentary have been granted to the undersigned Executor.

Sandra L. Lake, Executor
c/o Jacqueline A. Kelly, Esquire
Jan L. Brown & Associates
845 Sir Thomas Court, Suite 12
Harrisburg PA 17109

COFFEY vs. BEHL No. 2010-5-0646
PACSES No.: 049111872

Domestic Relations – Child Support – Contempt – Willful Non-Compliance – Ability to Pay – Earning Capacity - Determination of Earning Capacity – Obligor's Financial Choices.

1. A person who willfully fails to comply with any order, may, as prescribed by general rule, be adjudged in contempt. Contempt shall be punishable by any one or more of the following: (1) imprisonment for a period not to exceed six months; (2) a fine not to exceed $1,000.00; and (3) probation for a period not to exceed one year.

2. An order committing a defendant to jail under this section shall specify the condition the fulfillment of which will result in the release of the obligor.

3. The purpose of a child support contempt order is to coerce the obligor to comply with the Court's Order.

4. As evident from the statue itself, willful non-compliance is an element of civil contempt.

5. Willful non-compliance presupposes that the obligor has the ability to pay his obligation. If a Court determines that an obligor is financially unable to pay the amount of the Support Order, that Court should not generally find the Defendant in contempt.

6. The ability to pay paradigm so pervades child support contempt that even when a Trial Court is justified in finding an obligor in contempt, the amount of the purge cannot be so onerous as to be completely beyond the obligor's ability to pay. On the other hand, present inability to comply is an affirmative defense which must be proved by the alleged contemnor. Moreover, several appellate court decisions have equated willful failure with lack of good faith as it relates to a child support obligation.

7. Willful violation and present ability to pay must be evaluated within the context created by the obligor's own financial choices.

8. Child support obligors cannot avoid contempt by choosing to prioritize other financial needs and desires over those of their children.

9. If the trier of fact determines that a party to a support action has willfully failed to obtain or maintain appropriate employment, the trier of fact may impute to that party an income equal to the party's earning capacity.

10. Age, education, training, health, work experience, earnings history and child care responsibilities are factors which shall be considered in determining earning capacity.

COFFEY vs. BEHL No. 2010-5-0646
PACSES No.: 049111872

11. In order for an earning capacity to be assessed, the trier of fact must state the reasons for the assessment in writing or on the record.

12. When either party voluntarily assumes a lower paying job, quits a job, leaves employment, changes occupations or changes employment status to pursue an education, or is fired for cause, there generally will be no effect on the support obligation.

13. The Court concluded that Father's current financial situation is the result of his own behavior and conduct and that he could have maintained an income sufficient to pay his current support obligation, had he chosen to do so. Consequently, the Court found Father in contempt of this Court's Support Order and ordered him to spend 30 days in the Lebanon County Correctional Facility. The Court noted that had this not been Defendant's first contempt finding and had he not recently paid $3,000.00 toward his arrearages, the sentence would have been longer.

14. The Court also imposed a purge payment of $2,000.00, which equaled roughly one-third of the amount Father voluntarily chose to spend in advance rent instead of for child support.

15. The Court returned the above-referenced case to the DRM for an additional hearing. In doing so, the Court reminded the DRM that if she intends to impose an earning capacity upon Father, her analysis of the earning capacity must transcend an analysis of what Father earned at Hershey Medical Center.

Support Contempt Hearing. C.P. of Lebanon County, Civil Action-Law, No. 2010-5-0646.

Eleanor O'Donnell, Esquire, for Plaintiff

Christopher D. Behl, Pro Se

COFFEY vs. BEHL No. 2010-5-0646
PACSES No.: 049111872

IN THE COURT OF COMMON PLEAS OF LEBANON COUNTY PENNSYLVANIA
DOMESTIC RELATIONS SECTION No. 2010-5-0646
PACSES NO.: 049111872

LISA K. COFFEY, Plaintiff
v.
CHRISTOPHER D. BEHL, Defendant

ORDER OF COURT

AND NOW, this 17th day of March, 2014, in consideration of the testimony adduced at the Support Contempt Hearing of February 25, 2014, after review of the file, and in accordance with the attached Opinion, the Order of this Court is as follows:

1. The Defendant is found in contempt of this Court's Child Support Order. As a sentence for contempt, this Court directs that the Defendant be incarcerated in the Lebanon County Correctional Facility for a period of 30 days. The Defendant shall report to the Lebanon County Correctional Facility at 8:30 a.m. on March 25, 2014 to comply with this sentence. The Defendant may purge himself of contempt by payment in the amount of $2,000.00 to the Lebanon County Domestic Relations Office.

2. A review hearing should be conducted before a Domestic Relations Master within the next 90 days. The Domestic Relations Master is directed to consider the contents of the attached Opinion when rendering a decision.

3. When released from prison, the Defendant is to report every other week to the Lebanon County Domestic Relations Office. He is to comply with all recommendations of that office with respect to securing employment.

4. The Defendant is to notify the Domestic Relations Office immediately upon securing employment so that a wage attachment can be issued.

BY THE COURT:

BRADFORD H. CHARLES, J.

COFFEY vs. BEHL No. 2010-5-0646
PACSES No.: 049111872

APPEARANCES:

Eleanor O'Donnell, Esquire For Lisa K. Coffey
DOMESTIC RELATIONS OFFICE
Christopher D. Behl Pro Se

OPINION BY CHARLES, J., March 17, 2014

Tension invariably arises at the intersection of child support based upon earning capacity and child support contempt. On the one hand, when child support is predicated upon an artificially constructed income that does not represent actual cash, the resulting order will often become beyond the obligor's means. As a result, it becomes difficult for the Support Contempt Court to find that the Defendant "willfully violated" the Court Order. On the other hand, if courts are always limited to imposing Support Orders based upon actual income, the result would be to permit obligors to leave or refuse to work with impunity. If all a defendant needs to say in order to avoid support contempt is "I do not have any money," the ultimate result will be to render child support collection an exercise in futility.

How do we reconcile the tension between earning capacity and "willful violation" needed for a contempt finding? The answer to this dilemma can be excruciatingly difficult to discern. Of necessity, the Court's decision must be driven by the exigencies and equities of each specific fact pattern. Often, compromise decisions that please neither the Plaintiff nor the Defendant will become necessary.

In this case, we will find the Defendant in contempt for failing to comply with a Support Order based upon earning capacity. However, in part because we recognize that the Defendant no longer possesses the employment income from which his Support Order can be paid, we will impose a relatively minimal sanction and will direct that the underlying Support Order be reviewed as promptly as possible. The reasons for this "compromise" decision will be set forth below.

COFFEY vs. BEHL No. 2010-5-0646
PACSES No.: 049111872

I. FACTS

Lisa K. Coffey (hereafter "MOTHER") and Christopher D. Behl (hereafter "FATHER") are the parents of two children, ages 5 and 3. An initial Complaint for Child Support was filed by MOTHER on August 19, 2010. Extensive support litigation followed, some of which is not pertinent to the dispute now before us.

On April 12, 2012, a hearing was conducted before a Domestic Relations Master (DRM). At that time, the DRM noted that FATHER had been employed for eleven years at the Milton S. Hershey Medical Center and had earned $14.52 per hour. In addition, the DRM noted that FATHER had one other dependent in addition to the two children who are the subject of the above-referenced support litigation. Based upon all information presented, the DRM recommended that FATHER pay to MOTHER $600.00 per month in child support. Contempt proceedings were thereafter initiated against FATHER, but those contempt proceedings were withdrawn because assets were seized and wages were garnished from FATHER in an amount sufficient to cover his support obligation.

On August 13, 2013, FATHER filed a Motion seeking a modification of support. FATHER indicated that he had been terminated from his employment and that he no longer possessed the financial ability to pay child support. A hearing was again conducted before a DRM. In her Report, the DRM noted that FATHER was fired for absenteeism and that he had been warned prior to his termination. The DRM stated: "The only explanation that the Defendant gave at the hearing for his absences was that he could not afford to go to work." Because the DRM rejected FATHER's excuse for termination, she based her support recommendation upon FATHER's higher earnings at Hershey Medical Center. She then recommended that FATHER pay approximately $875.00 per month in support.

FATHER appealed the DRM's decision. We conducted oral argument on December 17, 2013. Once again, FATHER repeated his claim that he was forced to stop working because he could not afford to pay for gas for his car. Like the DRM, this Court categorically rejected FATHER's argument. We stated:

> At oral argument, FATHER proffered the exact same excuse for his termination that he presented to the DRM. This Court pressed FATHER vigorously regarding his claim. This Jurist advised FATHER that his claim that he could not put gas in the car to go five miles per day lacked any credibility whatsoever. This Jurist advised FATHER that he suspected FATHER was unnecessarily spending money on unnecessary indulgences such as drugs and gambling. FATHER vociferously denied that he was doing so. Instead, FATHER claimed that his

> multiple child support orders caused him to be a pauper.
>
> We are well aware that Pennsylvania law prevents a wage attachment for more than fifty-five percent of an individual's income. We are also aware that FATHER earned in excess of $15.00 per hour for full-time work at Hershey Medical Center. Even assuming that gasoline is $4.00 per gallon, and even assuming that FATHER drives a vehicle with poor gas mileage, the maximum cost per day that FATHER would need to spend for gas in order to travel five miles would be $2.50. FATHER earned more than enough to be able to afford this amount.

Based upon our analysis, we affirmed the DRM's decision to assess child support based upon FATHER's prior earnings at Hershey Medical Center. In doing so, we added the following language:

> We have been advised that a modification petition is pending before a DRM. It is not our intent to prevent FATHER from pursuing modification or to limit the DRM's options with respect to modification. We are fully aware that establishing a child support order that is well beyond FATHER's ability to pay will simply set him up for failure in contempt court. On the other hand, we are also aware that FATHER has not worked diligently to obtain substitute employment since he was fired in January of 2013. At this point, FATHER seems content to sit at home and do nothing. Given that FATHER has chosen to bring children into the world, sitting at home is simply not a option for him.

(Court Order of December 19, 2013 at pg. 3).

Another hearing was conducted before a DRM on December 19, 2013. At the time of the hearing, FATHER produced evidence that he was employed by Outback Steak House earning $7.50 per hour plus tips. Based upon documentation presented from FATHER's employer, the DRM determined that for the first three weeks of his employment, FATHER received $632.00 in wages and tips. However, the DRM did not base FATHER's support obligation upon this income. Instead, her recommendation was that FATHER's support obligation should continue to be predicated upon an earning capacity higher than his actual earnings. In support of her recommendation, the DRM wrote:

> A support hearing was held on September 19, 2013 and Defendant was held to his earnings at his prior job at the Hershey Medical Center. Defendant filed Exceptions and Judge Charles affirmed the DRM's decision, noting that

COFFEY vs. BEHL No. 2010-5-0646
PACSES No.: 049111872

> a Petition for Modification was pending. Defendant is currently working at Outback Steakhouse. During the 9 weeks for which earnings information is available, he earned $1,453.48 or $161.49/wk. He testified that he is not looking for other work, he is hoping that "business picks up." The Master believes that it is important to set an order which Defendant is able to pay. However, Defendant has not made diligent attempts to obtain replacement employment/ income since he left HMC. Additionally, Defendant testified that he has paid his rent in advance. He has paid his rent until September, 2014. As his rent is $625.00 per month; Defendant has paid over $6,000.00 toward future rent. (An amount that would cover over 6 months of his child support obligations.) Defendant testified that he paid money ahead for rent to avoid the money being seized by Domestic Relations. He further stated that he did not want to have to move again. The Master finds that Defendant has acknowledged that he has worked to hide money from Domestic Relations and his children; the Master finds these actions to be offensive to the Court and Defendant's children. The master is unwilling to reduce Defendant's support order when he has not made a good faith effort to find substitute employment for a job that he lost due to absenteeism after 12 ½ years and Defendant has spent income to avoid his child support responsibilities.

Not to anyone's surprise, FATHER did not pay his support obligation and a Petition for Contempt was filed. A hearing regarding the contempt petition was conducted before this Court on February 25, 2014. At the date of the hearing, we learned that FATHER's total arrearage balance was $4,671.66. We also learned that FATHER was sent a non-compliance letter on October 24, 2013 to which he did not respond. In addition, we were told that FATHER made a relatively large payment of over $3,000.00 in December of 2013. On the other hand, FATHER's support payments did not come close to fulfilling his Court-ordered obligation either before or after December of 2013.

At the February 25, 2014 contempt hearing, FATHER simply stated: "I do not have the money to pay this order." He pointed out that the amount of his two Support Orders exceeds his total income from Outback Steakhouse. He states that the $3,000.00 he paid in support and the $6,000.00 he paid in advance rent in December of 2013 represented the last of the money he removed from his pension at Hershey Medical Center. He essentially told this Court: "I am tapped out. There is nothing more that I have to give toward support."

Ordinarily, we render support contempt decisions in open court almost immediately after we hear argument from both sides. However, much about the above-referenced case

COFFEY vs. BEHL No. 2010-5-0646
PACSES No.: 049111872

troubled this Jurist to the point where it would not have been appropriate to render an immediate "off the cuff" decision. Therefore, we decided to take the contempt issue under advisement. We issue this Opinion today to explain why we will be finding FATHER in contempt.

II. LEGAL PRINCIPLES

Child support contempt is predicated upon 23 Pa.C.S.A. § 4345(a), which states:

> **§ 4345. Contempt for noncompliance with support order.**
>
> **(a) General rule.--**A person who willfully fails to comply with any order under this chapter, except an order subject to section 4344 (relating to contempt for failure of obligor to appear), may, as prescribed by general rule, be adjudged in contempt. Contempt shall be punishable by any one or more of the following:
>
> (1) Imprisonment for a period not to exceed six months.
>
> (2) A fine not to exceed $1,000.
>
> (3) Probation for a period not to exceed one year.
>
> **(b) Condition for release.--**An order committing a defendant to jail under this section shall specify the condition the fulfillment of which will result in the release of the obligor.

The purpose of a child support contempt order is to coerce the obligor to comply with the Court's Order. ***Hyle v. Hyle***, 868 A.2d 601 (Pa.Super. 2005); ***Childress v. Bogosian***, 12 A.3d 448 (Pa.Super. 2011).

As evident from the statue itself, willful non-compliance is an element of civil contempt. Our appellate courts have repeatedly emphasized that willful non-compliance presupposes that the obligor has the ability to pay his obligation. See, e.g., ***Godfrey v. Godfrey***, 894 A.2d 776 (Pa.Super. 2006) (contempt vacated because obligor did not have present ability to pay $34,000.00 in arrears); ***Barrett v. Barrett***, 368 A.2d 616 (Pa. 1977) ("Requiring a defendant to 'perform acts beyond his power to perform is in effect to convert a coercive sentence into a penal one…'" ***Id.*** at 621). If a Court determines that an obligor is financially unable to pay the amount of the Support Order, that Court should not generally find the Defendant in contempt. ***Calloway v. Calloway***, 594 A.2d 708 (Pa.Super.

COFFEY vs. BEHL No. 2010-5-0646
PACSES No.: 049111872

1991).[1] The "ability to pay" paradigm so pervades child support contempt that even when a Trial Court is justified in finding an obligor in contempt, the amount of the purge cannot be so onerous as to be completely beyond the obligor's ability to pay. ***Hyle v. Hyle***, 868 A.2d 601 (Pa.Super. 2005) (contempt vacated because defendant did not have the present ability to pay a $2,500 purge amount); ***Orfield v. Weindel***, 52 A.3d 275 (Pa.Super. 2012).

On the other hand, "present inability to comply is an affirmative defense which must be proved by the alleged contemnor." ***Barrett v. Barrett**, supra* at 621.[2] Moreover, several appellate court decisions have equated "willful failure" with "lack of good faith" as it relates to a child support obligation. See, e.g. ***Griffin v. Griffin***, 558 A.2d 86 (Pa.Super. 1989); ***Hopkinson v. Hopkinson***, 470 A.2d 981 (Pa.Super. 1984). See also, ***Commonwealth ex rel. Wright v. Hendrick***, 312 A.2d 402 (Pa.Super. 1973), which focused upon the question of whether the obligor's failure to pay was "through no fault of his own."

With respect to the willful non-compliance and present ability to pay, the case of ***Commonwealth ex rel. Cochran v. Cochran***, 489 A.2d 804 (Pa.Super. 1985) is instructive. In ***Cochran***, the Trial Court found the Defendant in contempt because he failed to fulfill his child support obligation. The obligor argued that his ability to earn money had been "severely restricted" as a result of a downturn in the economy. The obligor testified that he had to borrow money from family members to live and that he was financially unable to fulfill his child support obligation. The Superior Court rejected the obligor's argument, citing a luxury purchase that he had made for his girlfriend: "We find no abuse of discretion in holding the appellant in contempt for falling behind in his support payments as the $12,000.00 used to purchase the [girlfirend's] sports car could have been used more properly for payment of support." ***Id.*** at 808.

Cochran teaches that "willful violation" and "present ability to pay" must be evaluated within the context created by the obligor's own financial choices. In ***Cochran**,* the obligor had no present ability to pay child support, but he could have done so had he chosen not to expend money for a sports car. The lesson is clear: *child support obligors cannot avoid contempt by choosing to prioritize other financial needs and desires over those of their children.*

---

1 Pennsylvania Support Guidelines embody this general rule by creating a self-sufficiency reserve (SSR) amount below which child support cannot be attached. See, Pa.R.C.P. 1910.16-2(e).

2 While the burden of coming forth with evidence of present inability to comply is upon the obligor, we cannot incarcerate a support obligor unless we are "convinced beyond a reasonable doubt, from the totality of the evidence…that the contemnor has the present ability to comply." ***Barrett v. Barrett***, *supra* at 21.

COFFEY vs. BEHL No. 2010-5-0646
PACSES No.: 049111872

It also goes without saying that child support contempt cannot be imposed without some consideration of how the initial support order was derived in the first place. In Pennsylvania, almost all child support orders are calculated in accordance with Pennsylvania's Child Support Guidelines. See, 23 Pa.C.S.A. § 4322(a). These Guidelines place primary emphasis upon the net incomes of the respective parties. A rebuttable presumption exists that child support determined in accordance with the Guidelines "is the correct amount of support to be awarded." (Pa.R.C.P. 1910.16-1(d)).[3] Of particular note to the issue now before us is the Support Guideline section governing earning capacity. That section states:

> If the trier of fact determines that a party to a support action has willfully failed to obtain or maintain appropriate employment, the trier of fact may impute to that party an income equal to the party's earning capacity. Age, education, training, health, work experience, earnings history and child care responsibilities are factors which shall be considered in determining earning capacity. In order for an earning capacity to be assessed, the trier of fact must state the reasons for the assessment in writing or on the record. Generally, the trier of fact should not impute an earning capacity that is greater than the amount the party would earn from one full-time position. Determination of what constitutes a reasonable work regimen depends upon all relevant circumstances, including the choice of jobs available within a particular occupation, working hours, working conditions and whether a party has exerted substantial good faith efforts to find employment.

(Pa.R.C.P. 1910.16-2(d)(4)). In addition, the Support Guidelines also contain a provision dealing with "voluntary reduction of income." That provision states:

> When either party voluntarily assumes a lower paying job, quits a job, leaves employment, changes occupations or changes employment status to pursue an education, or is fired for cause, there generally will be no effect on the support obligation.

---

3 The viability of this type of presumption has been affirmed by our nation's highest court. See, ***Hicks on behalf of Feiock v. Feicok***, 485 U.S. 624, 108 S.Ct. 1423, 99 L.Ed.2d 721 (1988).

COFFEY vs. BEHL No. 2010-5-0646
PACSES No.: 049111872

Pa.R.C.P. 1910.16-2(d)(1).[4]

With all of the above in mind, we will turn to the facts of the above-referenced case. As we do so, we very quickly reach the conclusion that the equities of this case are not in FATHER's favor. We reach this conclusion for the following reasons:

---

4 There is an internal inconsistency between the Support Guideline sections relating to earning capacity and voluntary reduction of income. This Court has resolved that internal inconsistency by declaring that the "general rule" is that earning capacity cannot be based exclusively upon prior earnings. Relying upon ***Ewing v. Ewing***, 843 A.2d 1282 (Pa.Super. 2004), we have consistently declared that the analytical paradigm to be employed in Lebanon County regarding earning capacity is as follows:

(1) As a general rule, an individual's actual earnings represent the benchmark by which that individual's support obligation should be calculated.
(2) If an individual voluntarily reduces his/her income in an effort to lower a child support obligation, that individual's child support should be based upon earning capacity and not actual earnings.
(3) When an individual is terminated from employment via a decision imposed upon him by an employer, it is improper to "automatically" deny that person the opportunity to seek modification and it is improper to "automatically" impose an earning capacity based upon the parents' former earnings at the job from which he/she was terminated.
(4) When an individual is terminated from employment, an earning capacity may be imposed upon that parent after consideration of the following factors, *inter alia*:
    (a) The reason for the job termination;
    (b) Whether the parent's termination was in any way related to his/her desire to avoid paying child support;
    (c) Whether the parent made prompt and reasonable efforts to mitigate lost income by any means, including the procuring of new employment.
(5) If an earning capacity is deemed appropriate for an individual who has been terminated from his/her job, that earning capacity should not automatically be based upon the terminated individual's prior earnings. Rather, all of the factors set forth in Pa.R.C.P. 1910.16-2(d)(4) must be considered.

Shimer v. Sweinhart, C.P.Leb.Co. No. 2005-5-0354 (Feb. 26, 2010).

With the above being recognized, this Court has also consistently declared that a parent's lifestyle can and should be considered when assessing earning capacity. In ***Brown v. Brown***, C.P.Leb.Co. No. 2000-20880 (Feb. 13, 2013), we imposed an earning capacity upon a father who unnecessarily spent money on luxury items such as vacations, vehicles, etc. We have also consistently declared that an earning capacity is appropriate when an individual stubbornly refuses to obtain appropriate employment. See, e.g., ***Price v. Price***, C.P.Leb.Co. No. 1996-5-00517 (May 31, 2012).

COFFEY vs. BEHL No. 2010-5-0646
PACSES No.: 049111872

(1) FATHER formerly enjoyed an excellent job at Hershey Medical Center. He was fired because he simply stopped going to work. This is not acceptable for a father who has children to support.

(2) When FATHER was fired, he blamed the child support process for his absenteeism. He stated that he did not have enough money after paying child support to put gas in his car sufficient to enable him to drive five miles to work. The DRM did not find FATHER's claim to be credible. Neither did this Court.[5] Essentially, FATHER fabricated an excuse for his termination and to this day has hidden the real reason why he stopped going to work.

(3) FATHER did not immediately seek reemployment. When he did return to work, it was as a waiter, which is an unskilled job significantly beneath the type of job he should be able to procure given his past experience as a scheduling coordinator at Hershey Medical Center. At the most recent hearing, FATHER admitted to the DRM that he has not sought work commensurate with his prior experience and earnings.

(4) The parties' child support file is almost nine inches thick. Since MOTHER first sought support in 2010, FATHER has done everything in his power to minimize and/or avoid paying child support. He has challenged paternity, he has filed multiple modification requests, he has written letters of complaint, and he has appeared in the courtroom of this Jurist with a proverbial "chip on his shoulder." It is obvious to this Court that FATHER resents having to pay child support. Given this obvious attitude, is it a huge stretch to conclude that FATHER simply stopped working so that his child support obligation could be reduced? We think not.

(5) When FATHER did obtain a large sum of money in December of 2013, he paid enough to delay any child support enforcement action. However, rather than retain this money to pay the full amount he owed while looking for suitable replacement employment, FATHER chose to pay his rent in advance. He brazenly acknowledged that he paid his rent "to avoid the money being seized by Domestic Relations."

We freely acknowledge that FATHER's current support obligation of $876.00 per month is well beyond his ability to pay via wage attachment from employment earnings. We even acknowledge that FATHER may no longer possess bank accounts or assets from

---

5 When he stopped going to work, FATHER earned $15.15 per hour, which translated into $10,780 for the first quarter of 2013 (See DRM Decision of November 5, 2013). FATHER's support obligation for two children represented roughly 31% of FATHER's net pay. This is not an onerous amount.

COFFEY vs. BEHL No. 2010-5-0646
PACSES No.: 049111872

which child support could be paid.[6] Still, we cannot help but conclude that FATHER's current financial situation is the result of his own behavior and conduct. At multiple times and via multiple methods, FATHER could have maintained an income sufficient to pay his current support obligation. His choice not to do so has been voluntary. From both a visceral and legal perspective, FATHER's conduct has truly been contemptuous of this Court's Support Order and of his moral obligation to support his children.

Having reached the above conclusion, we must articulate that our review of the file has caused us to revisit both our December 19, 2013 Court Order and the January 31, 2014 decision of the DRM. Both decisions essentially perpetuate a support obligation for FATHER that is predicated upon his past employment at Hershey Medical Center. Moreover, neither decision included an analysis of all of the earning capacity factors set forth in the Pennsylvania Support Guidelines. As much as the equities of this case must be analyzed against FATHER, we are forced to also recognize that a child support order of $876.00 per month against FATHER is neither sustainable nor enforceable on a long term basis. Any decision we render today must account for this recognition.

III. DECISION

Via a Court Order that we will enter simultaneous with this Opinion, we will be finding FATHER in contempt of this Court's Support Order. Given that FATHER did recently pay $3,000.00 toward his arrearages, and given that this will represent FATHER's first contempt finding, the sentence that we will impose as a result of FATHER's contempt will require him to spend "only" 30 days in the Lebanon County Correctional Facility. We will impose a purge payment of $2,000.00, which equals roughly one-third of the amount FATHER voluntarily chose to spend in advance rent instead of child support.

In addition to the support contempt decision outlined above, we will again be returning the above-referenced case to the DRM for an additional hearing. As we do so, we remind the DRM that if she intends to impose an earning capacity upon FATHER, her analysis of the earning capacity must transcend an analysis of what FATHER earned at Hershey Medical Center. Any earning capacity must be based upon all of the factors set forth in Pa.R.C.P. 1910.16-2(d). We also remind the DRM that while it would be completely appropriate to add back $645.00 per month to FATHER's income based upon his "advance

6 The file clearly reveals that the Domestic Relations Office has been extremely diligent in seizing monies from accounts possessed by FATHER. Had FATHER possessed bank accounts, we are confident that the Domestic Relations Office would have attached them.

rent" payments, the amount of these monthly advance rental payments does not alone justify an indefinite continuation of child support in excess of $875.00 per month.

We will end by stating this to FATHER. *You have made a series of very poor choices as it relates to your children and your child support obligation. There are consequences to those poor choices, and you will experience one of those consequences over the next 30 days. A portion of the decision we have rendered above will likely result in a reduction of your child support obligation going forward. You should not mistakenly believe that such a result will cause us to forget your poor choices or limit you to paying a support amount that you find comfortable. You have chosen to create two children. Parents who choose to create children must sacrifice. It is time for you to invest yourself vigorously in locating full-time employment. While we recognize that jobs such as the one you enjoyed at Hershey Medical Center do not grow on trees, any decision we render in the future regarding your earning capacity will be based in no small part upon our perception of the seriousness with which you approach your job search and child support payment obligations.*

With the above being said, we will enter an Order today to effectuate the decisions we have articulated above.